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State v. Stadtmiller Respondent's Brief Dckt. 40513

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. LARRY LEE JAMES STADTMILLER, Defendant-Appellant.	)	No. 40513 Idaho Co. Case No. CR-2011-51171

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

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STATEMENT OF THE CASE

Nature Of The Case

Larry Lee James Stadtmiller appeals from the judgment of conviction and sentence entered upon the jury verdict finding him guilty of sexual abuse of a minor under sixteen years of age. Stadtmiller specifically challenges the district court's refusal, prior to trial, to allow him to enter an Alford[1] plea of guilt to an amended charge of felony injury to child; he also asserts that his sentence of nine years with three years fixed is excessive.

Statement Of The Facts And Course Of Proceedings

According to the trial testimony, Stacy Ruzicka, a former boyfriend of Lori Esquivel, helped raise Lori's daughter, "K.E.," who was born in 2001.[2] (10/10/12 Tr., p.74, L.13 – p.75, L.16; p.100, Ls.3-8.[3]) Ruzicka allowed his friend, Stadtmiller, to live in either his house or camper for about a year. (10/10/12 Tr., p.77, Ls.3-19.) During Christmas vacation in 2011, K.E. and Ruzicka's own daughter, J.R., visited him and stayed at his house while Stadtmiller was also staying there. (10/10/12 Tr., p.80, Ls.10-25.) On Christmas eve, K.E. and J.R. went to sleep in the living room; K.E. slept on the couch and J.R. slept on the recliner. (10/10/12 Tr., p.82, L.23 – p.83, L.2.) K.E. was wearing a long T-shirt-like Mickey Mouse shirt and underwear. (10/10/12 Tr., p.106,

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

[2] Ruzicka testified that he shared a child in common ("J.R.") with Lori Esquivel, his former girlfriend. (10/10/12 Tr., p.73, L.5 – p.74, L.20.) When Ruzicka met Lori, she was pregnant with K.E., and after K.E. was born, Ruzicka considered her like his own daughter and helped to raise her. (10/10/12 Tr., p.75, Ls.3-16.)

[3] All references to "10/10/12 Tr." are to the trial transcript that began at 11:29 a.m. on that date – not the 10/10/12 transcript that began at 9:12 a.m. with jury selection.

Ls.6-21.) After she fell asleep, K.E. was woken up when Stadtmiller walked into the living room. (10/10/12 Tr., p.107, Ls.8-19.) Stadtmiller covered J.R. with a blanket that had fallen off, and then picked up K.E.'s blanket and put it on her, picked up her legs, sat down, and put her legs on top of him. (10/10/12 Tr., p.108, Ls.6-21.) K.E. described what happened next:

> Then he started rubbing my legs, and then he started like rubbing my arms. And then he rubbed right here like my waist, and then after that he touched my vagina, and I started screaming around for like ten seconds.

(10/10/12 Tr., p.108, L.24 – p.109, L3.) K.E. explained that Stadtmiller was "putting his hands and squeezing" her vagina for about ten seconds, and when he stopped for a second and then "started doing it again," she got up, went to the bathroom, and then went to tell her dad (Ruzicka). (10/10/12 Tr., p.109, Ls.7-25.) According to Ruzicka, when K.E. reported the incident to him she was crying, and when he went to the hallway to find Stadtmiller, Stadtmiller was gone. (10/10/12 Tr., p.84, Ls.2-11.) The next morning, Ruzicka reported the incident to law enforcement. (10/10/12 Tr., p.85, Ls.5-19.)

The state charged Stadtmiller with sexual abuse of a child under sixteen. (R., pp.17-18.) On April 25, 2012, the parties entered into a verbal agreement whereby Stadtmiller would enter an Alford guilty plea to felony injury to a child, with joint recommendations for, *inter alia*, probation and a psychosexual evaluation (and any recommended counseling). (R., pp.30-31; 4/25/12 Tr., p.5, L.9 - p.6, L.17.) However, the district court refused to accept the Alford plea because Stadtmiller neither admitted guilt nor claimed he was unable to recall committing the crime because he was under

the influence of alcohol, drugs, or had some other physical injury. (R., pp.30-31; 4/25/12 Tr., p.27, L.9 – p.28, L.1; p.29, Ls.16-22; p.30, Ls.15-24.)

The next day, the parties entered into a Rule 11 binding plea agreement in which Stadtmiller pled guilty to an amended charge of felony injury to a child, and the parties agreed to recommend at sentencing that Stadtmiller would not be ordered to serve any additional jail, would be placed on supervised probation, and would obtain a psychosexual evaluation and follow any recommendation of that evaluation. (R., pp.32-36.) The Rule 11 plea agreement bound the district court to its terms if, after reviewing the presentence report and evaluations, the court agreed to accept the plea. (Id.; 7/19/12 Tr., p.36, L.17 – p.37, L.2.) After reviewing the report and evaluations, the court refused to accept the Rule 11 plea agreement because Stadtmiller continued to deny guilt, which made it "impossible for [him] to start counseling, let alone complete including [sic], so probation is not viable." (R., pp.46-47; 7/19/12 Tr., p.37, L.2 – p.38, L.14.)

At trial, a jury convicted Stadtmiller of sexual abuse of a child under the age of sixteen years. (R., p.63.) The district court sentenced Stadtmiller to a unified nine year term with three years fixed. (R., pp.76-78.) Stadtmiller filed a timely notice of appeal. (R., pp.79-81.)

ISSUES

Stadtmiller phrases the issues on appeal as:

1. Did the district court abuse its discretion when it rejected Mr. Stadtmiller's first attempted *Alford* plea?

2. Did the district court abuse its discretion when it imposed a unified sentence of nine years, with three years fixed, upon Mr. Stadtmiller following his conviction for sexual abuse of a minor child?

(Appellant's Brief, p.5.)

The state rephrases the issues as:

1. Assuming the district court applied an incorrect legal standard in rejecting Stadtmiller's Alford plea, is such error harmless?

2. Has Stadtmiller failed to establish that his sentence is excessive?

ARGUMENT

I.
Assuming The District Court Applied An Incorrect Legal Standard In Rejecting Stadtmiller's *Alford* Plea, Such Error Is Harmless

A. Introduction

The district court refused to accept Stadtmiller's attempted Alford plea because (1) the factual basis he asserted during the plea colloquy was inconsistent with guilt and (2) Stadtmiller did not assert that he was unable to recall committing the criminal act. (R., pp.30-31; 4/25/12 Tr., p.27, L.9 – p.28, L.1; p.29, Ls.16-22; p.30, Ls.15-24.) Stadtmiller contends that by categorically limiting the applicability of an Alford plea to those two situations, the district court abused its discretion because it "did not act consistently with the legal standards applicable to whether to accept an Alford plea." (Appellant's Brief, p.6.)

Stadtmiller's contention that the district court applied an incorrect legal standard in deciding whether to accept his Alford plea appears to be well-taken. Assuming such an error occurred, it was harmless. In the event the error is not found harmless, this case should be remanded to the district court for a determination of whether it would have accepted Stadtmiller's Alford plea under the correct legal standard.

B. Standard Of Review

A district court's refusal to accept an Alford guilty plea is reviewable for abuse of discretion. Schoger v. State, 148 Idaho 622, 627, 226 P.3d 1269, 1274 (2010). "In considering a claimed abuse of discretion, [the appellate court] applies a three-factor test focusing upon: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and

consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Id.

C. Although Stadtmiller's Denial Of Guilt Did Not Legally Preclude His *Alford* Plea, The Error Is Harmless Because The Record Shows, Beyond A Reasonable Doubt, Without It, The District Court Would Have Exercised Its Discretion By Rejecting Stadtmiller's *Alford* Plea

In Schoger v. State, 148 Idaho 622, 628, 226 P.3d 1269, 1275 (2010), the Idaho Supreme Court explained the law applicable to Alford pleas:

> In *Alford*, the United States Supreme Court upheld the trial court's acceptance of a guilty plea from a defendant even though he asserted factual innocence to the charge of second degree murder. 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. In that case, the trial court heard evidence from various witnesses that strongly indicated Alford's guilt before accepting his plea. *Id.* at 27, 91 S.Ct. at 162, 27 L.Ed.2d at 166. Alford then testified that:
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> > I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.
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> *Id.* at 29 n. 2, 91 S.Ct. at 163 n.2, 27 L.Ed.2d at 166 n.2[.] The Supreme Court found such a plea to be constitutionally permissible *so long as the charge is supported by a strong factual basis*. In sum, the Court held that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* Idaho recognized the validity of an *Alford* plea as early as 1981 when we stated, "[a]s long as there is a strong factual basis for the plea, and the defendant understands the charges against him, a voluntary plea of guilty may be accepted by the court *despite a continuing claim by the defendant that he is innocent.*" *Sparrow v. State*, 102 Idaho 60, 61, 625 P.2d 414, 415 (1981) (citing *Alford*, 400 U.S. at 25, 91 S.Ct. at 161, 27 L.Ed.2d at 162).

(Emphasis added.) In Schoger the Idaho Supreme Court held that because Schoger did not provide a strong factual basis for her Alford plea in her colloquy with the court,

and her attorney expressed doubt about whether a factual basis could be shown,[4] the district court had "reasoned reservations about whether a factual basis existed for Schoger's guilty plea[,]" and did not abuse its discretion in rejecting her Alford plea. Schoger, 148 Idaho at 628-629, 226 P.3d at 1275-1276.

Here, in contrast to Schoger, the prosecutor attempted to provide a factual basis for Stadtmiller's Alford plea to the amended charge of felony injury to child. (4/25/12 Tr., p.12, L.20 – p.13, L.13.) However, the district court refused to accept Stadtmiller's Alford plea, stating, "I can only accept the plea, number one, if you admit guilt, or number two, under certain circumstances where you're under the influence of drugs or alcohol to the point where you don't remember what happened." (4/25/12 Tr., p.27, Ls.17-21; see id., p.27, L.23 – p.28, L.1 ("But clearly you remember everything that happened . . . and you haven't admitted any guilt, and under the law I can't accept a plea of guilty if you aren't guilty"); p.29, Ls.17-19 ("Well, under those circumstances ... you haven't admitted guilt as far as I can tell, and it isn't an Alford situation."); p.30, Ls.11-24 ("[T]his isn't an Alford situation. You weren't drunk beyond the point where you can't remember or under the influence of drugs which you can't remember, which is what an Alford Plea [sic] is, or head injury or something like that. But based on everything you've said you haven't indicated that you have committed any crime.").)

The district court's comments that, in order to qualify as an Alford plea, Stadtmiller had to either admit his criminal act (in which case there would be no need for an "Alford" plea) or assert he could not recall his criminal conduct, is inconsistent with

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[4] The Schoger opinion does not divulge whether, in keeping with common practice, the prosecutor attempted to supply a factual basis for Schoger's *Alford* plea. See generally Schoger, 148 Idaho 622, 226 P.3d 1269.

the standard set forth in Schoger.[5] As Schoger explained,: "'[a]s long as there is a strong factual basis for the plea, and the defendant understands the charges against him, a voluntary plea of guilty may be accepted by the court despite a continuing claim by the defendant that he is innocent.'" Schoger, 148 Idaho at 628, 226 P.3d at 1275 (quoting Sparrow, 102 Idaho at 61, 625 P.2d at 415).

In light of the district court's various statements that it did not have discretion to accept Stadtmiller's Alford plea unless he either admitted guilt or claimed he could not recall the criminal incident, the court appears to have employed an incorrect standard of law. However, any error is harmless.

Stadtmiller's attempt to enter an Alford plea to an amended charge of felony injury to child would have been rejected even if the district court recognized it had discretion to accept the plea despite Stadtmiller's denial of guilt. Because the record shows that, beyond a reasonable doubt, the district court would have rejected Stadtmiller's Alford plea under the correct legal standard, the error was harmless. State v. Perry, 150 Idaho 209, 221-222, 245 P.3d 961, 973-974 (2010).

The terms of the Alford-based plea agreement required Stadtmiller to obtain a psychosexual evaluation from Steve Lindsley and for both parties to recommend that Stadtmiller be "placed on probation subject to the terms and conditions set by the Court, which would include counseling if recommended by Mr. Lindsey [sic]." (4/25/12 Tr., p.6,

[5] There is no hint in Alford that an *Alford* plea should be limited to where a defendant either admits guilt or asserts an inability to recall the criminal incident. Alford denied shooting the victim, and faced with a possible death penalty for first degree murder, pled guilty to second degree murder to avoid such penalty. Alford, 400 U.S. 25. The Court stated: "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Alford, 400 U.S. at 37.

Ls. 1-13.) However, Stadtmiller's attempt to enter an Alford plea during the April 25, 2012, hearing failed due to his refusal to admit guilt or assert he could not recall the criminal incident. As a result, prior to rejecting Stadtmiller's Alford plea, the district court did not reach the point of considering whether, by denying guilt, Stadtmiller could be a viable candidate for probation and counseling.

Those questions were subsequently answered after Stadtmiller entered into a binding Rule 11 plea agreement in which he pled guilty to an amended charge of felony injury to child, and which required the court to consider the presentence report and other evaluations prior to sentencing in deciding whether it would accept the Rule 11 agreement. (R., pp.32, 34-38; 7/19/12 Tr., p.36, Ls.17-25.) On July 19, 2012, the district court held a hearing in which it rejected Stadtmiller's Rule 11 plea agreement, explaining:

> I'm not going to accept the Rule 11 agreement for two reasons. One is the same problem we had last time when you entered a plea. You didn't think you did anything wrong, and these evaluations indicate that you still don't feel that you did anything criminal or did anything wrong. . . .
>
> The other part of it is, is the plea agreement was for supervised probation, which involves some type of counselings [sic], CSC or whatever it might be. All counseling, doesn't matter what it is, all counseling starts with one thing: The person has to sit there in front of everybody else and say, well, I did these things and they're criminal, and I knew they were wrong and I own up to them and I'm facing up to them. You don't think you did anything wrong, and so it's impossible for you to start counseling, let alone complete including [sic], so probation is not viable.
>
> So, for those reasons the Court is not accepting the Rule 11 agreement.

(7/19/12 Tr., p.37, L.2 – p.38, L.4.) In short, the district court rejected Stadtmiller's guilty plea to an amended charge of felony injury to child because he continued to deny his

criminal conduct[6] and, accordingly, would not be able to comply with the counseling requirements of probation.

By the same token, although the terms of Stadtmiller's Alford-based plea agreement did not require the court to grant probation, the agreement required both parties to recommend probation and counseling (as recommended by the psychosexual evaluator), and it appears that probation and counseling were considered certainties.[7] Even if the court had recognized it had discretion to accept Stadtmiller's Alford plea without an admission of guilt, it would have rejected such a plea based on its general discretionary decision to not accept pleas of guilt unless the defendant actually admits guilt and can succeed on probation. See Schoger, 148 Idaho at 630, 226 P.3d at 1277 ("We hereby remove all doubt by holding that no provision of Idaho law, including I.C.R. 11, requires a court to accept a guilty plea. Acceptance of such a plea is specifically within the discretion of the trial court.) As the court explained to Stadtmiller at the Rule 11 hearing, "You don't think you did anything wrong, and so it's impossible for you to

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[6] The amended charge of felony injury to child alleged that Stadtmiller caused K.E. mental suffering by "rubbing her in her vaginal area on the outside of her clothing." (R., p.37.) The original Information charged Stadtmiller with sexual abuse of a child under the age of sixteen, alleging he placed "his hands upon the legs, breasts and genitals" of K.E. (R., p.17.)

[7] The prosecutor explained that both parties would recommend Stadtmiller's release that same day, Stadtmiller (erroneously, it turns out) had no felony record, the state would not oppose a withheld judgment, and Stadtmiller would obtain a psychosexual evaluation and "be placed on probation subject to the terms and conditions set by the Court, which would include counseling if recommended by [the evaluator]." (4/25/12 Tr., p.6. Ls.1-13.)

start counseling, let alone complete including [sic], so probation is not viable."[8] (7/19/12 Tr., p.37, L.24 – p.38, L.2.)

Just as the district court exercised its discretion in rejecting Stadtmiller's Rule 11 plea by concluding that probation and counseling were not viable options,[9] it would have, beyond a reasonable doubt, done likewise in regard to Stadtmiller's proffered Alford plea. See Perry, 150 Idaho at 221-222, 245 P.3d at 973-974. Therefore, even if the district court committed an error in rejecting Stadtmiller's Alford plea, such error was harmless.

D. If The Error Is Not Harmless, This Case Should Be Remanded To The District Court To Determine Whether, Utilizing The Correct Legal Standard, It Would Have Accepted Stadtmiller's *Alford* Plea

Assuming that the error in this case is not deemed harmless, the proper remedy is to remand the case to the district court for a determination of whether, applying the proper legal standard for an Alford plea, it would have accepted Stadtmiller's Alford

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[8] See Steele v. State, 153 Idaho 783, 791 n.9, 291 P.3d 466, 474 n.9 (Ct. App. 2012) ("Nonetheless, this case highlights problems that may be encountered when an *Alford* plea is entered in a sex offense case. Consequently, the best practice may be to avoid the entry of *Alford* pleas in sex offense cases".).

[9] It is generally well-settled that a trial court has broad discretion to reject a guilty plea when the defendant refuses to admit his participation in the crime or continues to assert his innocence. E.g., United States v. O'Brien, 601 F.2d 1067, 1069-70 (9th Cir. 1979) (rule requiring acceptance of plea of person claiming actual innocence would not promote public policy); United States v. Martin, 528 F.3d 746 (10th Cir. 2008); United States v. Preciado, 336 F.3d 739, 743 (8th Cir. 2003); United States v. Hernandez-Rivas, 513 F.3d 753 (7th Cir. 2008) (rejection of guilty plea where defendant would not provide adequate factual basis for plea was proper); State v. Williams, 851 S.W.2d 828 (Tenn. Ct. Crim. App. 1992); State v. Clanton, 612 P.2d 662, 667 (Kan. App. 1980); Howard v. State, 458 A.2d 1180, 1184-85 (Del. 1983) (no error for court to reject plea of defendant professing innocence); People v. Ottomanelli, 505 N.E.2d 1328 (Ill. App. 1987) ("a court is not obliged to accept a plea of guilty from a defendant who professes innocence").

plea. United States v. Rashad, 396 F.3d 398, 403 (D.C. Cir. 2005) (case remanded to trial court to determine whether it would have accepted Alford plea had it understood it had discretion to do so). See Lafler v. Cooper, --- U.S. ----, 132 S.Ct. 1376 (2012).[10]

Here, as in Rashad, because the district court incorrectly concluded Stadtmiller was "not eligible" to enter an Alford plea without admitting guilt, it did not determine whether the factual basis presented by the prosecutor "was sufficiently strong to justify an *Alford* plea," Rashad, 396 F.3d at 402, nor whether, in its discretion, it would have accepted such a plea. Therefore, even if the error in this case were not harmless, the

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[10] In Lafler v. Cooper, --- U.S. ----, 132 S.Ct. 1376, the Supreme Court determined that trial counsel for Respondent Cooper had provided ineffective assistance by advising Cooper to reject a plea offer (to dismiss two of four charges with a recommendation of 51-to-85 month sentences) that led to trial and conviction on all four counts and a mandatory minimum sentence of 185-to-360 months. The Court rejected the state's argument that a "fair trial wipes clean any deficient performance by defense counsel during plea bargaining[,]" id. at 1388, and in considering prejudice under Strickland v. Washington, 466 U.S. 668 (1984), the Court found that Cooper "has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea." Lafler, --- U.S. ----, 132 S.Ct. at 1391. Even though the Court made those "probability" findings, it allowed the trial court to exercise its discretion to determine whether the jury convictions should be vacated, stating:

> As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, *or to leave the convictions and sentence from trial undisturbed. See* Mich. Ct. Rule 6.302(C)(3) (2011) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence recommendation, the court may . . . reject the agreement."). *Today's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.*

Id. (emphasis added).

proper remedy would be to remand it to the district court for a determination, utilizing its discretion, of whether to accept an Alford plea from Stadtmiller. Rashad, 396 F.3d at 403; see Lafler, n.9, supra; Missouri v. Frye, --- U.S. ----, 132 S.Ct. 1399 (2012).[11]

II.
Stadtmiller Has Failed To Establish His Sentence Is Excessive

A. Introduction

Stadtmiller claims his sentence for sexual abuse of a minor under sixteen years of age is excessive and asserts the district court abused its discretion at sentencing by failing to give adequate consideration to the mitigating factors of his substance abuse problems and support for his family. (Appellant's Brief, pp.15-18.) Stadtmiller has failed to meet his burden of establishing the district court abused its discretion at sentencing.

B. Standard Of Review

When a defendant alleges an excessive sentence on appeal the appellate court conducts an independent review of the record that considers the nature of the offense, the defendant's character and protection of society. State v. Reinke, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982) "Absent a showing of a clear abuse of discretion, a sentence within statutory limits will not be disturbed on appeal." State v. Hedger, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). "To show an abuse of

[11] In Missouri v. Frye, --- U.S. ----, 132 S.Ct. 1399, 1411 (2012), decided the same day as Lafler, where trial counsel was ineffective for failing to communicate a plea offer (vis-à-vis providing ill-advice to reject a plea offer as in Lafler), the Supreme Court remanded the case for further proceedings to determine: (1) if the prosecutor could have cancelled the plea agreement, and if so, whether Frye could show a reasonable probability the prosecutor would have adhered to the agreement, and (2) whether the trial court could have refused to accept the plea agreement, and if so, whether Frye could show a reasonable probability the trial court would have accepted the plea.

discretion, [Stadtmiller] must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts." State v. Stevens, 146 Idaho 139, 149, 191 P.3d 217, 227 (2008) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002)).

C. Stadtmiller Has Failed To Establish His Sentence Is Excessive

Stadtmiller contends the district court abused its discretion by failing to adequately consider his substance abuse problems and his support for his family. (Appellant's Brief, pp.1-18.) Stadtmiller's argument is without merit.

To determine whether the trial court abused its sentencing discretion, an appellate court independently reviews "all of the facts and circumstances of the case," including the record, and considers the nature of the offense and the character of the offender. State v. Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing." State v. Cross, 132 Idaho 667, 671, 978 P.2d 227, 231 (1999) (internal citations omitted). "The 'primary consideration [in imposing sentence] is, and presumptively always will be, the good order and protection of society.'" State v. Butcher, 137 Idaho 125, 137, 44 P.3d 1180, 1192 (Ct. App. 2002) (quoting State v. Moore, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577,

38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

In fashioning an appropriate sentence, the district court expressly said it was considering "rehabilitation, protecting society, retribution, making the victims whole, those types of things that we're all aware of." (11/1/12 Tr., p.188, Ls.9-14.) Contrary to Stadtmiller's argument that the district court failed to adequately consider his alcohol abuse, the court made his alcohol problem the main point of consideration throughout the sentencing hearing, as the court's following comments show:

> You do have a significant substance abuse problem. . . . I didn't think probation was appropriate. As far as a rider program, I'm not convinced that that's the answer either in this case. I don't think that would give you what you need to change significantly once you're out of prison. You will be out of prison eventually. It's not going to be a lifetime sentence or anything like that, so you will get out of prison. And between now and then, there will be substance abuse counseling. There will be other types of counseling, but I don't think a rider – which is a very short program. It can be anywhere from three to nine months – would give you enough help in order to get a real handle on the alcohol problem. It does appear to me based on what I heard at the trial and so forth that what happened that night was probably somewhat influenced, if not entirely influenced, by the alcohol consumption. But, it is my opinion that a sentence in this case should include incarceration at the State Board of Corrections [sic]. I'm not convinced that it has to be an extremely long period of time since there were no prior incidents, and since it is – everything seems to revolve around alcohol I think those can be addressed with the appropriate sentence.

(11/1/12 Tr., p.189, L.14 – p.190, L.20.) The record demonstrates that the district court thoroughly considered Stadtmiller's alcohol abuse as a factor in its sentencing determination.

Stadtmiller contends that the district court "also did not adequately consider [his] own support of his family." (Appellant's Brief, p.17.) It appears that the support Stadtmiller is referring to is based on a letter his sister, Lisa Bond, provided the court at sentencing requesting Stadtmiller not be imprisoned because she had been given a shortened life expectancy and their 82 year-old mother was in failing health. (Appellant's Brief, pp.17-18.) The district court read Ms. Bond's letter and presumably considered her concerns. (11/1/12 Tr., p.175, Ls.9-20.) Despite the laudable reasons for not wanting Stadtmiller to be imprisoned, those reasons were not enough to deter Stadtmiller from engaging in his criminal conduct. Inasmuch as the court's primary objective was to protect society, its decision to imprison Stadtmiller was not an abuse of discretion. See Baker, 136 Idaho at 577, 38 P.3d at 615.

The district court also considered K.E.'s trial testimony, the Presentence Report ("PSI") and the psychosexual evaluation ("PSE"). (11/1/12 Tr., p.171, Ls.22-25; p.176, Ls.3-8.) Stadtmiller's criminal record included at least 18 prior criminal convictions, two of which were felonies – taking a motor vehicle without permission in 1992 and illegal possession of a firearm in 2003. (PSI, pp.3-7.) The nature of Stadtmiller's crime weighed in favor of incarceration as he took advantage of his friendship with Stacy Ruzicka, whom K.E. considered her father, to violate ten year-old K.E.'s physical and emotional well-being by fondling her vagina after she had gone to sleep in the couch in her father's living room. Stadtmiller's actions had a harmful impact on K.E., who wrote:

> What happened to me made me feel sad and scared I'm am scared to stay at my Dad's hous now and it made me feel unsafe when he touch me. I thought I could troust him but I know I can't anymore. And I feel mad that he did this to my life. And I also get scared at my mom's house too. And like he scared my hole family what he has done to me."

(PSI, p.2 (verbatim).)

Despite the harm Stadtmiller caused, he refused to accept responsibility for his actions. The psychosexual evaluator opined:

> In looking at the overall dynamics of Mr. Stadtmiller's offenses, the most prominent feature is his denial of them. By doing so he does not have to assume any culpability. In a sense he is seeing himself as the victim. This approach is probably not something he has used just for these offenses but most likely has been used in other situations in his life. . . . As testing has shown Mr. Stadtmiller has a hard time conforming his behaviors to societal expectations. While this has not necessarily resulted in very serious criminal acts, the accumulative effect of having several minor acts is reflecting this. Usually by the time someone reaches the fourth decade of their lives they begin to show a decline in such behavior. Mr. Stadtmiller his [sic] continued to display them. This is not seen as a good sign.

(PSE, p.16.) The PSE evaluator concluded, "Looking at the combine [sic] rating schedules, they are placing [Stadtmiller] somewhere in the moderate range for sexually re-offending. The primary precipitating factor would be his continued use of alcohol. Under those circumstances he is more likely to act impulsively." (PSE, p.17.)

Inasmuch as appellate courts must take into account "the nature of the offense, the character of the offender, and the protection of the public interest[,]" State v. Hopper, 119 Idaho 606, 608, 809 P.2d 467, 469 (1991), Stadtmiller's sentence is fully warranted; he has a lengthy criminal history; his sexual offense was serious and caused significant harm to K.E.; he refused to accept any responsibility for his crime; and given his continued use of alcohol, he remains a moderate risk to commit yet another sex offense.

Given any reasonable view of the facts, Stadtmiller has failed to establish an abuse of sentencing discretion.

CONCLUSION

The state respectfully requests this Court to affirm Stadtmiller's judgment of conviction and sentence for sexual abuse of a minor under sixteen years of age.

DATED this 7th day of November, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of November, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BEN PATRICK MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm